IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT.

F. V. McDONALD,
Plaintiff in Error,
vs.
DOLPHUS B. HANNAH, *et. al.*,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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F. V. McDONALD,
Plaintiff in Error,
vs.
KATE E. HANNAH AND D. B. HANNAH,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON.

STATEMENT OF FACTS.

Plaintiff in error brought ejectment in the court below to recover the possession of four acres of land, situated in Tacoma, Pierce county, State of Washington, of the value of forty thousand dollars ($40,000). The pleadings on the part of the plaintiff contain the usual allegations peculiar to this kind of action.

The defendants claim to own the property by virtue of certain tax proceedings and deed, all of which are set out at length in their answer.

The court, after considering all the evidence, decided that the plaintiff had not made a *prima facie* case, and gave judgment against him for costs.

The bill of exceptions contains all the evidence, and the assignment of errors present the questions upon which we ask the judgment of this court.

Plaintiff contends that his case showed a perfect legal title in him, and was sufficient in any event to warrant a judgment in his favor, and that he established a *prima facie* case in three ways.

I.

TITLE BY DEED.

A patent from the United States to Thomas Hood.

A deed from Thomas Hood to C. P. Ferry and L. C. Fuller.

A deed from C. P. Ferry and L. C. Fuller and their wives to E. M. Burton.

A deed from E. M. Burton to C. P. Ferry and L. C. Fuller.

A deed from Ferry and Fuller and their wives to Workingmen's Joint Stock Association, a corporation.

A deed from Ferry and Fuller and their wives and the Workingmen's Joint Stock Association to George P. Riley and thirteen others.

A power of attorney from George P. Riley and thirteen others to John W. Matthews.

A deed from George P. Riley and others by John W. Matthews (their attorney in fact) to Mary A. Givens.

A deed from Mary A. Givens to the plaintiff.

Each of the above conveyances purport to convey the property in question, and each conveyance is regularly executed, except that objection is made that the power of attorney was not executed by all the tenants in common, although they are all named in the body of the instrument.

There were fourteen tenants in common of this land and eleven joined in the power authorizing Matthews to sell their interest therein. This he did and executed and delivered a deed of this premises to Mary A. Givens. This deed, we contend, operated to invest her with the legal title to eleven-fourteenths, and if we are correct in this, she or her

grantee can maintain ejectment against any person in possession who does not hold under one or more of the other tenants in common.

"A deed executed by only a part of the persons named in the body as grantors is good as to the executing parties and conveys their interest in the property."

Colton vs. Seavy, 22 Cal. 497.
Spect vs. Gregg, 51 Cal. 198.

Sedgwick and Wait on trial of title to land, Section 300.

Stark vs. Barratt, 15 Cal. 361, 68, 70.
Prenn vs. Emerick, 6 Ohio, 391.
Barnhart vs. Campbell, 50 Mo. 597.
Gales vs. Salmon, 35 Cal. 588.
Sutter vs. San Francisco, 36 Cal. 115.
Chapman vs. Godfrey, 18 Mich. 38.

II.

TITLE BY DECREE.

The plaintiff also introduced in evidence a decree in partition rendered in the circuit court of the United States for the district of Washington, in the case of F. V. McDonald against John Donaldson, *et. al.*

By this decree the title both legal and equitable to the property in question was established in the plaintiff as the grantee of Mary A. Givens.

The defendants in error were not made parties in that case, and they insist for that reason that the decree is not binding upon them, and does not and cannot affect any right they may have in or to this property.

We concede the correctness of this general proposition, but it has no application in a case like this.

In the partition case the decree partitioned the property according to equitable principles between all the tenants in common of the property, and, of course, is conclusive between them, and operates to confirm to plaintiff the title to this land as effectually as a deed from them could have done.

And it also operates to establish the fact of title as therein decreed so far as the defendants in error are concerned, unless it appears that they had some interest in the property; it is not pretended that defendants in error have any interest unless the tax title asserted in their answer is good. If they have no title or interest susceptible of establishment in a court they are not in a position to say that the decree does not settle the title.

This doctrine is the exception to the general proposition above stated; and commencing with Burr vs. Gratz, 4 Wh. 213, the courts of this country have in an unbroken line of decisions established this proposition.

"An error alleged is, that the court allowed the decree of the circuit court in the chancery suit between Michael Gratz and John Craige and others, to be given in evidence to the jury; in our opinion this record was clearly admissible."

"It is true that in general, judgments and decrees are evidence only in suits between parties and privies, but the doctrine is wholly inapplicable to a case like the present when the decree is introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate without establishing the existence of the decree it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiff's which was made under the authority of that decree.

"And under such circumstances to reject the proof of the decree would be in effect to declare that no title derived under a decree in chancery was of any validity, except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity.

"It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit because they were *res inter alios acta*."

Barr vs. Gratz's Heirs, 4 Wh. 213.
Gregg vs. Forsyth, 24 How. 179.
Durst vs. Morris, 14 Wal. 484.
Sitton vs. Gregg, 31 Me. 488.

"A stranger to the title and having no interest in the property cannot attack the decree."

Custer vs. Shipman, 35 N. Y. 533.
Buskingham vs. Hannah, 2 Ohio St. 561.
Fowler vs. Savage, 3 Conn. 90.
Gage vs. Condy, 30 N. E. 320.
Kooler vs. Hoffman, 1 McCrary, 492.
Freeman on Judgments, Section 416.

III.

COMMON SOURCE OF TITLE.

The plaintiff claims title by deed from Mary A. Givens, dated October 17, 1886.

Defendants claim that the property in question was assessed to and sold as the property of Mary A. Givens, and in their answer they allege that she owned the property at the time of the assessment, and if this claim is true she is presumed to have been the owner.

Hews vs. McClellan, 80 Cal. 303.

Because the assessment would be a nullity if made in the name of any person other than the owner.

—— vs. Bair, Was. Sup. St. Feb. 14, 1893.
Abbott vs. Lindinboner, 42 Mo. 162.
Bird vs. Benlisi, 12 Sup. Ct. Rep. 323.

Defendants also claim and allege in their answer that this property was sold, and that a tax deed was made by the sheriff pursuant to said assessment and sale, and they claim solely under said tax deed, dated September 16, 1886.

The recitals in the tax deed are to the effect that the property was assessed to Mary A. Givens, and that she owned the property, and that the taxes were due from her.

We claim, therefore, that the defendants derive title, if they have any, from Mary A. Givens, and that under the pleadings and evidence it is conclusively established that both parties claim from and under the same common source.

Neither party, therefore, will be permitted to deny that Mary A. Givens was the owner of the property at the time when it is claimed she was divested of her title.

No question of law is more fully established than this.

"In ejectment suits where both plaintiff and defendant claim title from the common source, the plaintiff is only required to prove such source of title, as neither will be permitted to dispute such title."

Jackson vs. Tatebo, 3 Was. 461.

"The plaintiff and defendants both claim under Shiel, and it is not necessary for either to prove title further back than him.

"The defendants sets up an estate in fee in Willis in the premises to defeat a recovery by the plaintiff in this action, and if he has any interest therein, upon the evidence, it is derived from Shiel by means of the sheriff's sale and deed.

"The plaintiff claims under Shiel also, by a conveyance subsequent to that of the sheriff's. Neither is, therefore, at liberty to deny Shiel's title at the time of the sheriff's sale."

Mickey vs. Stratton, 5 Saw. 475.

"Where both parties assert title from a common source and no other source, neither can deny that such common grantor had a valid title."

Robertson vs. Pickrel, 109 U. S. 617.
Cox vs. Hast, 145 U. S. 964.
Cook vs. Avery, 13 Supt. Ct. Rep. 347.

"If both parties claim title from the same person neither is at liberty to deny that such person had title."

Gaines vs. New Orleans, 6 Wal. 718.

"It is true there is a rule in action for the recovery of land that the plaintiff must recover on the strength of his

own title; but to that rule there is a well-established exception, when the plaintiff and defendant claim from the same common source."

Johnson vs. Cobb, 7 S. E. 601.

"In actions of ejectment where both the plaintiff and defendant claim under the same third person it is *prima facie* sufficient for the plaintiff to prove such common derivation without proving that such third person had title."

Laidley vs. Land Company, 4 S. E. 707.

"Where both parties claim title from the same intermediate grantor, it is not prejudicial to permit plaintiff to put in evidence the original patent since the state of the title antecedent to the common source is immaterial."

Gallagher vs. Bell, 47 N. W. 897.

"Where both parties in ejectment claim through a common grantor, it is sufficient for the plaintiff to prove title to that source."

McWhorter vs. Hetzel, 24 N. E. 743.

"It is unnecessary and immaterial to go back of a common source and determine whether he had a complete chain of title."

Ebersole vs. Rankin, 15 S. W. 424.

"Where the plaintiff shows from the deeds offered or the admission in the pleadings that both claim from a common source, he is required to exhibit a better title in himself, derived from it, than the defendant in order to establish *prima facie* his right to recovery; *it does appear from the pleadings and evidence that he claims under a tax title*

for the plaintiff's interest, and if that is shown to be void, there is no other obstacle in the way of plaintiff's recovery."

Bonds vs. Smith, 11 S. E. 322.

"There were certain title papers given in evidence by plaintiff in the line of title to the ownership of Sarah Stuart, to which defendant objected as ineffectual to pass legal title, and which the court told the jury were ineffectual to do so, but as both parties claim under Sarah Stuart, the plaintiff need not have traced his title further back than her, to show that she had title."

Lowe vs. Settle, 9 S. E. 923.

"If in an action of ejectment both parties claim title from the same source, it is not necessary for the plaintiff to introduce in evidence a conveyance from a former owner to the person having this source of title, *and if error is committed in admitting the record, it was an error which could not have injured the defendant.*"

Spect vs. Gregg, 51 Cal. 200.

"Where the plaintiff only proved conveyance from the common grantor, the objection that he established no title in such grantor, is cured if the defendant sets up in defense his own conveyance from the same person, he being then estopped from denying such title."

Ellis vs. Jeans, 7 Cal. 409.

"If evidence of title back of a common source is offered, *it is immaterial whether it shows a good title in the common source or not*, neither party will be permitted to question that title."

Bank vs. Harrison, 39 Mo. 433.
Dupont vs. Davis, 30 Wis. 176.
Sexton vs. Rhames, 13 Wis. 102.
Farrell vs. Hennessy, 21 Wis. 634.
Finch vs. Ulman, 24 Am. St. 383.

The defendants in their answer pleaded specially their title and are thereby precluded from showing any title other than that conveyed by the tax deed.

The rule seems to be well settled that in this statutory action, if the defendant pleads his title specially, he waives the general issue and is confined to the defense thus specially pleaded. In Jones vs. Johnson, 19 S. W. 522, the supreme court of Texas said:

"The principal which underlies this doctrine, is, that when a party, either plaintiff or defendant in an action of trespass to try title, pleads his title specially, he gives his adversary notice that he rests his case upon the title so pleaded, and it is to be presumed that he relies upon no other."

Cook vs. Avery, 13 Sup. Ct. Rep. 347.

It follows necessarily therefore, that if defendant's tax title is valid, this case should be affirmed; but if no title was conveyed by the tax deed, the judgment should be reversed.

DEFENDANT'S TAX TITLE.

Plaintiff contends that the defendants are in possession of the property without any title or valid claim thereto, their only claim of title is said tax title, which we insist is void.

I.

Because the property was never assessed.

The property to recover which this action is brought, is properly described as: "Commencing 53½ chains *north* and 6 chains *east* of the *southwest* corner of section 5,

in township 20 north, range three (3), *east* of the Willamette meridian; thence running *east* 6 chains, thence *south* 6⅔ chains; thence *west* 6 chains; thence *north* 6⅔ chains to the place of beginning, containing four (4) acres."

The description on the assessment roll is as follows:

"Commencing 60 chains *north* and 6 chains *east* of the *northwest* corner of section five (5), township twenty (20) *north*, range 3, *east* of the Willamette meridian; thence running *east* 6 chains; thence *south* 6⅔ chains; thence *west* 6 chains; thence *north* 6⅔ chains to the place of beginning, containing four (4) acres."

The description employed in the assessment roll, was carried into the duplicate assessment roll, and in the advertisement or notice of sale.

There has not been, therefore, any taxation or sale of the property sued for, and necessarily the tax deed is void.

Cooley on Taxation, 352.
Bird vs. Bentisa, 12 Sup. Ct. Rep. 328.

II.

THE TAX DEED.

This deed falsely recites the assessment and sale of the property sued for, a circumstance that is legitimately explained upon the theory that some *disinterested* person attempted to cover up the invalidity of the tax proceedings by procuring a deed, which, on its face, showed the apparent validity of the proceedings prior to its execution.

Section 2934 of the statute provides that a tax deed shall run: "*In the name of the Territory of Washington.*"

This statute was taken from a statute of Wisconsin which provides that all tax deeds shall run in the name of the State of Wisconsin.

The supreme court of that state has repeatedly decided that unless the tax deed conforms to that provision it is void on it face.

Edgerton vs. Bird, 6 Wis. 527.
Woodman vs. Clapp, 21 Wis. 462.
Lindsley vs. Jay, 25 Wis. 462.

This deed does not run in the name of the territory, but in the name of the sheriff, this is conclusively shown by the granting clause in the deed which is as follows, viz.:

"NOW, THEREFORE, THIS INDENTURE WITNESSETH, That for and in consideration of the sum of $4.78, to the sheriff paid at the time of making said sale, the receipt whereof is acknowledged in said certificate of sale. *I, Lewis Boyd, sheriff of Pierce county, Washington territory, by virtue and in pursuance of the statutes in such cases made and provided, have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell and confirm unto the said W. B. Kelley, and to his heirs and assigns forever, * * * as fully and absolutely as I, Lewis Bird, sheriff as aforesaid, may or* can fully sell the same. * * *

"IN WITNESS WHEREOF, *I have hereunto set my hand and seal the day and year first hereinbefore written.*"

III.

The deed is void because the sheriff was not authorized to make it.

The attempted assessment and sale was for city taxes of Tacoma, Washington territory.

The only provision of the charter affecting this question is found in Section 34, which provides that the city has power "to assess, levy and collect taxes for general municipal purposes, not to exceed one-half of one per cent. per annum upon all property, both real and personal within the city which is by law taxable for territorial and county purposes."

Clearly the power to sell land for delinquent taxes is not conferred by this section. Authority "to assess, levy and collect," does not include the power to enforce collection for the non-payment of the tax by a sale and conveyance of the property.

Cooley on Taxation.
Paine vs. Sprately, 5 Kan. 450.
McInnery vs. Moodey, 25 Iowa, 410.
Merriam vs. Moodey, 25 Iowa, 163-70.
Morrison vs. Hershiu, 32 Iowa, 271.

Landreth vs. Lang, 6 Kan. 274.
Hays vs. Hogan, 5 Cal. 241.

Section 1 of the charter expressly authorizes the city to sue and be sued, and the power, therefore, "to assess, levy and collect," taxes can be enforced, and the object of the corporation secured without the power of sale. The power of sale is not a necessary incident to the power "to assess, levy and collect," nor is such power indispensable to the objects and purposes of a municipal corporation, it can enforce the collection of its taxes by the ordinary judicial proceedings in the courts, and it will be presumed that that means of enforcing payment was intended whenever the power to sell is not expressly given and conferred by the charter.

McInnery vs. Reid, 23 Iowa, 410.
Merriam vs. Moodey, 25 Iowa, 170.
Paine vs. Spratley, 5 Kan. 537.
Blackwell on Taxation, 448.

If, therefore, the power to sell has not been conferred by the charter, no authority to execute a conveyance is conferred; the power to "collect" will not warrant the execution of a deed.

"In the matter of the sale and conveyance of lands for the non-payment of taxes, municipal corporations have no implied powers, they can execute only such authority as has been expressly given by statute, and that authority must be strictly construed and pursued, the express power conferred on a corporation to levy taxes and sell lands for the non-payment of them has been held not to imply or give the corporation power to convey land sold to the purchaser."

Blackwell on tax titles, 448-9.
Knox vs. Peterson, 21 Wis. 247.
2 Dillon on M. C. Section 818.

IV.

This deed is not made by the city or any of its officers, and we have been unable to discover any authority in the charter which warrants a sale by the sheriff of the county, or a deed by either the sheriff or the territory, and we contend that the deed is void for that reason.

The deed also recites that the notice of sale stated that said property would be sold to satisfy "All tax penalties, interest and costs due the territory and the said county." It does not say that said property would be sold to satisfy city taxes.

V.

STATUTE OF LIMITATION.

Section 2,939 of the general statutes of 1881 provide that—

"Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid on (or) the land redeemed as provided by law, shall be commenced within three years from the recording of the tax deed of sale and not thereafter, except by the purchaser at the tax sale."

Defendant's tax deed was recorded more than three years before the institution of this action, and defendants claim the benefit of this section of the statute, and insist that the tax deed cannot be attached for any cause after the expiration of three years from the recording of the tax deed.

That section applies only in a case where the action is for "*the recovery of land sold for taxes.*" We have shown that *this* land was not assessed, advertised or sold for taxes, and that there were no taxes levied on the land, consequently it could not be sold "for taxes."

Bird vs. Benlisi, 12 Sup. Ct. Rep. 324.

The above section appears in the general revenue laws of the territory, and is expressly referable and made applicable to deeds executed pursuant to a sale of lands for delinquent territorial and county taxes, and does not operate in the case of a sale of lands for city taxes unless expressly made applicable by the charter.

1 Dillon, Section 816.
Brown vs. Spokane Falls, 27 Pac. Rep. 1,079.
Gould vs. Baltimore, 59 Md. 378.
Moore vs. Baltimore, 61 Md. 224.
Denver vs. Knowles, 30 Pac. Rep. 1,041.
Tounsend vs. Lute, 109 U. S. 504.

VI.

The statute of limitation does not operate in a case where the tax deed is void upon its face.

Redfield vs. Parks, 132 U. S. 239.
Moore vs. Brown, 11 How. 414.
Watson vs. Door, 18 Kan. 223.
Hafford vs. McKenna, 23 Fed. Rep. 36.
Daniels vs. Case, 45 Fed. Rep. 843.
Gomer vs. Chaffee, 6 Cal. 314.
Sheehy vs. Hinds, 27 Minn. 259.
Mason vs. Gorman, 85 Mo. 526.
Richards vs. Thompson, 23 Pac. Rep. 106.
Sims vs. Drexel, 78 Iowa, 255.
Wagoner vs. Mann, 48 N. W. 1,065.

VII.

If the deed is regular on its face but void because some essential steps in the exercise of the taxing power has not been complied with, it will not operate to set the statute of limitations in motion.

Easley vs. Whittenham, 43 Iowa 162.
Bird vs. Bensili, 12 Sup. Ct. Rep. 323.
Hurd vs. Brisner, 28 Pac. Rep. 371.
Melchoer Chair Co. vs. Bair, Wash. Sup. Ct.
——— ———February 14, 1893.
See cases last above cited.

VIII.

February 3d, 1886, the legislature enacted a law which provides that no tax deed should issue until after service of a notice of the exemption of the time for redemption had expired.

Without a citation of the numerous authorities holding that a tax deed is void unless the notice is given, we refer to the case of Coulter vs. Stafford, now under consideration in this court, where this identical question is involved. The decision in that case must determine this question in this case.

The opinion of the circuit court is that the only interest Mary A. Givens ever had in the property was dower as the widow of James H. Givens, deceased, and that neither she nor her grantee could maintain ejectment until after assignment of her dower.

We respectfully submit that there is no such question in this case.

This valuable property defendants claim was sold to their grantor for four dollars and seventy-eight cents, ($4.78) and to sustain such sale they exhibit and claim under a deed false in its recitals, and based upon proceedings which disclose an attempt by some one to alter the city records.

All the testimony in this case is before this court, and if the tax deed is found to be invalid, the case should be reversed and the lower court directed to enter a judgment according to the prayer of the complaint.

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